

FOLEY & LARDNER LLP
 NICHOLAS P. HONKAMP, California Bar No. 261229
 nhonkamp@foley.com
 555 California Street, Suite 1700
 San Francisco, California 94104
 Telephone: (415) 434-4484
 Facsimile: (415) 434-4507

FOLEY & LARDNER LLP
 ELEY O. THOMPSON, *pro hac vice* to be filed
 ethompson@foley.com
 DIANE G. ELDER, *pro hac vice* to be filed
 delder@foley.com
 R. SPENCER MONTEI, *pro hac vice* to be filed
 rmonte@foley.com
 312 North Clark Street, Suite 2800
 Chicago, Illinois 60654
 Telephone: (312) 832-4500
 Facsimile: (312) 832-4700

Attorneys for Plaintiff
 TOAD & CO. INTERNATIONAL, INC.

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

Toad & Co. International, Inc.
 a Delaware corporation,

Plaintiff,

vs.

**Marmot Mountain, LLC D/B/A Marmot and
 D/B/A ExOfficio**, a Delaware limited liability
 company;

Defendant.

Civil Action No. _____

COMPLAINT FOR TRADEMARK
 INFRINGEMENT AND UNFAIR
 COMPETITION (INJUNCTIVE RELIEF
 SOUGHT)

DEMAND FOR JURY TRIAL

1 Plaintiff Toad & Co. International, Inc. (“Toad & Co.” or “Plaintiff”) complains of
2 Defendant Marmot Mountain, LLC d/b/a Marmot and d/b/a ExOfficio (“ExOfficio” or
3 “Defendant”), and alleges as follows:
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5 **PARTIES, JURISDICTION AND INTRA-DISTRICT ASSIGNMENT**

6 1. Toad & Co. is a Delaware corporation doing business in the State of California
7 and has its principal place of business at 2020 Alameda Padre Serra # 125, Santa Barbara,
8 California 93103. The harm complained of herein has been and continues to be willfully
9 inflicted by the Defendant and suffered by Toad & Co.
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11 2. ExOfficio is a Delaware limited liability company which, upon information and
12 belief, has its principal place of business at 5789 State Farm Drive, Ste. 100, Rohnert Park, CA
13 94928 within Sonoma County, California. ExOfficio is operating retail clothing stores in
14 various locations throughout the United States, including in San Francisco, California. Upon
15 information and belief, Defendant is purposefully directing infringing and other improper
16 activities into California generally, and this district specifically, including through retail stores
17 such as REI located in San Francisco, California and through direct internet sales such as
18 www.exofficio.com.
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20 3. Defendant is registered to do business in California as entity no. 200424610297,
21 has a registered business location in San Francisco under record 0457427-01-001, and has a
22 registered agent for service in California.

23 4. Defendant is doing business in this district sufficient to establish general and
24 specific jurisdiction through its headquarters and other places of business in this district and
25 California, in addition to its other purposeful activities directed at and occurring in this district
26 and California.
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1 5. This Court has subject matter jurisdiction by virtue of the facts that: (1) this is a
2 civil action arising under 15 U.S.C. §§ 1051, *et seq.*; and (2) jurisdiction is expressly conferred
3 in accordance with 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, and 1367.

4 6. Venue is proper in the Northern District of California in accordance with 28
5 U.S.C. § 1391(b) and (c) because a substantial part of the events or omissions giving rise to the
6 claims occurred in this district including: Defendant's headquarters and stores being located in
7 this district, Defendant's registrations as businesses operating within this district, including for
8 service of process, Defendant's purposeful infringing acts and transaction of business in this
9 district, and Defendant's use of the MODERN TRAVEL trademark within this District.

10 7. Intra-district assignment to any division of the Northern District is proper under
11 Local Rule 3-2(c) as this Complaint involves "Intellectual Property Rights."

12
13 **FACTS AND ALLEGATIONS COMMON TO ALL COUNTS**

14 8. Since long before the improper acts of the Defendant complained of herein began,
15 Toad & Co. has been engaged in the business, *inter alia*, of the manufacture and sale of a
16 variety of clothing products, including men and women's shirts, jackets, sweaters, pants, shorts,
17 and leggings to the general public at Toad & Co. stores and via Toad & Co.'s online retail store
18 located at www.toadandco.com. In addition, Toad & Co.'s products are sold at other brick-and-
19 mortar and online retail outlets, including, REI, Title Nine Sports, Half-Moon Outfitters, and
20 Trailblazer.

21 9. Prior to the acts of the Defendant complained of herein, Toad & Co. developed its
22 MODERN TRAVEL clothing collection, including, *inter alia*, shirts, coats, sweaters,
23 sweatshirts, vests, parkas, and overcoats. Since at least as early as February 1, 2015, and long
24 prior to the acts of the Defendant complained of herein, Toad & Co. has sold its MODERN
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1 TRAVEL clothing products throughout the United States, in Toad & Co. retail stores and
2 through Toad & Co.'s online retail store. In addition, since long prior to the acts of Defendant
3 complained of herein, Toad & Co.'s MODERN TRAVEL clothing has been sold through other
4 retail stores, including REI.

5
6 10. Since the introduction of its MODERN TRAVEL clothing collection, Toad & Co.
7 has sold millions of dollars' worth of MODERN TRAVEL clothing products and has annually
8 spent substantial sums to advertise and promote its MODERN TRAVEL products.

9 11. By virtue of the aforesaid extensive use, sales, advertising and promotion, all of
10 which began long prior to the acts of the Defendant complained of herein, Toad & Co.'s mark
11 MODERN TRAVEL has become well known among consumers and acquired a strong
12 secondary meaning signifying Toad & Co.

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14 12. Toad & Co. has registered its aforesaid mark MODERN TRAVEL in the United
15 States Patent and Trademark Office as Registration No. 4,919,338 for: "clothing, namely,
16 shirts, capris, coats, sweaters, sweatshirts, jackets, pullovers, vests, pants, shorts; fleece and
17 insulated clothing, namely, shirts, vests, and outerwear, namely, parkas, overcoats, rain and
18 weather resistant jackets" in Int. Cl. 25. Said registration is valid, active, and owned by Toad &
19 Co.

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21 13. Toad & Co. now owns valuable goodwill, which is symbolized by its aforesaid
22 trade mark MODERN TRAVEL.

23 14. Upon information and belief, long after Toad & Co.'s adoption, use and
24 registration of its mark MODERN TRAVEL, Toad & Co.'s former head of sales and marketing,
25 who, while employed by Toad & Co., had significant responsibility for the development and
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1 introduction of the MODERN TRAVEL clothing collection, including to REI, became
2 employed by Defendant, as General Manager of ExOfficio.

3 15. Upon information and belief, long after Toad & Co.'s adoption, use, and
4 registration of the mark MODERN TRAVEL, and subsequent to Toad & Co.'s former head of
5 sales and marketing becoming employed by Defendant, Defendant commenced use of the mark
6 MODERN TRAVEL for a line of clothing undergarments. Upon information and belief,
7 Defendant's MODERN TRAVEL clothing is sold through Defendant's retail stores, and
8 Defendant's online website located at www.exofficio.com. In addition, Defendant's MODERN
9 TRAVEL clothing is sold to REI and at REI stores.
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11 16. Upon information and belief, the Defendant adopted the aforesaid mark MODERN
12 TRAVEL with actual knowledge of and in willful disregard of Toad & Co.'s prior rights in the
13 mark MODERN TRAVEL and with the intent to trade upon the goodwill represented by Toad
14 & Co.'s mark MODERN TRAVEL.
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16 17. Defendant's aforesaid use of the mark MODERN TRAVEL falsely and deceptively
17 represents the Defendant's MODERN TRAVEL products, and is likely to cause confusion with
18 the use by Toad & Co. of its well-known mark MODERN TRAVEL, or cause deception or
19 mistake as to source, sponsorship, or approval of the Defendant's aforesaid products.
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21 18. The Defendant's aforesaid use of the mark MODERN TRAVEL is greatly and
22 irreparably damaging to Toad & Co. and will continue to damage Toad & Co. until enjoined by
23 this Court; wherefore, Toad & Co. is without adequate remedy at law.
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COUNT I
FEDERAL TRADEMARK INFRINGEMENT
(15 U.S.C. § 1114-1117)

19. Toad & Co. realleges and incorporates by reference each of the allegations contained in paragraphs 1 through 18 as though set forth fully herein.

20. Toad & Co. owns the strong, valid, and registered MODERN TRAVEL trademark, in addition to common law rights.

21. Without consent of Toad & Co., Defendant has used, in connection with the sale, offering for sale, distribution or advertising of its clothing products, Toad & Co.'s mark MODERN TRAVEL.

22. Defendant has willfully infringed upon Toad & Co.'s mark MODERN TRAVEL.

23. Defendant's acts of trademark infringement have been committed with the intent to cause confusion, mistake, or deception, and are in violation of 15 U.S.C. § 1114.

24. As a direct and proximate result of Defendant's infringing activities, Toad & Co. is entitled to recover its substantial damages and Defendant's unlawful profits under 15 U.S.C. § 1117.

25. Defendant's infringement of Toad & Co.'s MODERN TRAVEL trademark is an exceptional case and was intentional, entitling Toad & Co. to treble the amount of its damages and Defendant's profits, and to an award of attorney's fees under 15 U.S.C. § 1117.

26. Toad & Co. has been, and will continue to be, damaged and irreparably harmed by the actions of Defendant, which will continue unless Defendant is enjoined by this Court. Toad & Co. has no adequate remedy at law. Toad & Co. is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

COUNT II
FEDERAL UNFAIR COMPETITION
(15 U.S.C. § 1125(a))

27. Toad & Co. realleges and incorporates by reference each of the allegations contained in paragraphs 1 through 26 as though set forth fully herein.

28. Toad & Co. owns strong and valid common law rights in the MODERN TRAVEL trademark, such rights also being registered.

29. Without consent of Toad & Co., Defendant has marketed and sold in commerce clothing products under Toad & Co.'s mark MODERN TRAVEL.

30. Defendant's aforesaid use of the mark MODERN TRAVEL constitutes a misleading use of a word, term, name, trade dress, symbol or device, or a combination thereof, in violation of the United States Trademark Act, 15 U.S.C. § 1125(a).

31. Toad & Co. has been, and will continue to be, damaged and irreparably harmed by the actions of Defendant, which will continue unless Defendant is enjoined by this Court. Toad & Co. has no adequate remedy at law. Toad & Co. is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

COUNT III
CALIFORNIA UNFAIR COMPETITION
(Cal. Bus. & Prof. Code §§ 17200 *et seq.*)

32. Toad & Co. realleges and incorporates by reference each of the allegations contained in paragraphs 1 through 31 as though set forth fully herein.

33. Toad & Co. owns strong and valid common law rights in the MODERN TRAVEL trademark, such rights also being registered.

34. Without consent of Toad & Co., Defendant has marketed and sold in commerce clothing products under Toad & Co.'s well-known mark MODERN TRAVEL.

35. Defendant's aforesaid use of the mark MODERN TRAVEL constitutes an "unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising" in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*

36. As a consequence of ExOfficio's actions, Plaintiff has suffered injury in fact and lost money or property as a result of ExOfficio's unfair competition.

37. As a consequence of ExOfficio's actions, Toad & Co. is entitled to injunctive relief preventing the conduct alleged in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Toad & Co. prays for judgment that:

1. Defendant be adjudged to have infringed Toad & Co.'s MODERN TRAVEL trademark in violation of 15 U.S.C. §1114, common law, and California law.

2. Defendant be adjudged to have competed unfairly with Toad & Co. in violation of 15 U.S.C. §1125(a), common law, and California law.

3. Defendant, ExOfficio, and all others who are officers, partners, agents, servants, employees, and attorneys, and all those in active concert or participation with them, be temporarily, preliminarily and permanently enjoined from:

a. using the mark MODERN TRAVEL for clothing or related products or services, including by continued shipping and sales of such clothing to REI;

b. using any name, mark or logo consisting, in whole or in part, of the term MODERN TRAVEL for clothing or related products or services;

c. using any other name, mark or logo which is a reproduction, counterfeit, copy or colorable imitation of Toad & Co.'s mark MODERN TRAVEL;

d. Doing any other act or thing likely to confuse, mislead or deceive others into

1 believing that either Defendant, their services, or products emanate from Toad & Co. or
2 are connected with, sponsored by or approved by Toad & Co.

3 4. Defendant, ExOfficio, be required, in accordance with 15 U.S.C. § 1118,
4 to deliver to Toad & Co. for destruction all labels, signs, prints, packages, wrappers,
5 receptacles, advertisements and all plates, models, matrices, and other means of making the
6 same, as well as all related goods and things in Defendant's possession, custody, or control
7 bearing the mark MODERN TRAVEL, or any other simulation or counterfeit of the mark
8 MODERN TRAVEL, or any other reproduction, counterfeit, copy, or colorable imitation of
9 Toad & Co.'s trade indicia.
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11 5. Defendant, ExOfficio, be required to pay to Toad & Co., in accordance
12 with 15 U.S.C. § 1117(a), three times such damages as Toad & Co. has suffered as a result of
13 Defendant's intentional acts of infringement, unfair competition and deceptive trade practices,
14 and three times all profits wrongfully derived by Defendant from such acts, together with Toad
15 & Co.'s costs, including reasonable attorney fees.
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17 6. Defendant, ExOfficio, be required to pay Toad & Co.'s restitution and
18 actual damages suffered as a result of Defendant's acts of unfair competition, as well as punitive
19 damages in a sum sufficient to deter future acts of unfair competition in accordance with Cal.
20 Bus. & Prof. Code §§ 17200 *et seq.*
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22 7. Toad & Co. have such other and further relief as the Court deems just and
23 proper.
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

Respectfully Submitted,

FOLEY & LARDNER, LLP
NICHOLAS P. HONKAMP, California Bar No.
261229
ELEY O. THOMPSON, *pro hac vice* to be filed
DIANE G. ELDER, *pro hac vice* to be filed
R. SPENCER MONTEI, *pro hac vice* to be filed



Dated: June 29, 2018

Nicholas P. Honkamp
Attorneys for Plaintiff TOAD & CO.
INTERNATIONAL, INC.